

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 994 of 1995

with

Misc. Criminal Application No.5081 of 1995

(suo-motu for enhancement of sentence of appellant
No.1-Natvarbhai Alias Babubhai Karsanbhai Parmar)

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

and

Hon'ble MR.JUSTICE R.R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

NATVARBHAI @ BABUBHAI & OTHERS.

Versus

STATE OF GUJARAT

Appearance:

Mr. K.J. Shethna, Senior Counsel, for

MR YU MALIK for appellants

Mr. K.G. Sheth, APP, for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI and

MR.JUSTICE R.R.TRIPATHI

Date of decision: 28/12/1999

COMMON ORAL JUDGEMENT (Per: Kadri, J.)

1. Appellants, by filing this appeal under Section
374 of the Code of Criminal Procedure, have challenged
judgment and order dated September 5, 1995, of the
learned Additional Sessions Judge, Court No.6, City &
Sessions Court, Ahmedabad, in Sessions Case No.90 of

1994, by which appellant No.1 was convicted for the offences under Sections 302 and 498(A) of the Indian Penal Code and sentenced to undergo imprisonment of R.I. for life under Section 302 of Indian Penal Code and R.I. for two years under Section 498(A) of the Indian Penal Code, and appellant No.2 was convicted under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment of R.I. for life.

2. On December 4, 1995, when Criminal Appeal No.994 of 1995 was placed for admission/hearing before the Court (Coram: K.J. Vaidya & M.H. Kadri, JJ.), the following order was passed:

"Admit

1. Notice for enhancement of sentence be issued against Natvarbhai alias Babubhai Karsanbhai Parmar, appellant-accused No.1.

2. Since printing of the record takes considerable time and further since, we have issued notice for enhancement of sentence to appellant accused No.1, with a view to see that the 'Sword of Democles' is not kept hanging over the head of appellant No.1, we dispense with printing. But at the same time, we direct the Sessions Court to prepare the paper book as clear and complete as the printed one and forward the same so as to reach this Court on or before 15th February 1996 without fail, and on receipt of the same, the office is directed to place this appeal on the final hearing board in the first week of March, 1996.

3. Mr. K.V.Shelat, Ld Advocate appearing for the appellant No.2, has vehemently pressed for bail. Having regard to the facts and circumstances of the case, it is not possible to accede to his request. When this much order was passed, it was pointed out to us by Mr. Shelat that many a time, despite a fixed date is given, the concerned matter is not heard and, in this case, if the appeal is not heard in the first week of March, 1996, then, he may be permitted to revive his application for bail for appellant No.2. The Ld. APP has no objection if the Ld. Advocate for the appellant No.2 makes such an application.

4. In this view of the matter so far as applicant No.2, Raju alias Rajeshbhai Karsanbhai Parmar is concerned, his request for bail is refused at this stage however, with liberty to move for bail, in case the appeal is not heard in the first week of March 1996."

2. As the proceedings arose from the same judgment and order and, as common questions of facts and law are involved, we propose to dispose the Criminal Appeal as well as Criminal Misc. Application of by this common judgment.

3. The prosecution case, as unfolded at the trial, be summarized, as under:-

Marriage between appellant No.1 and Madhuben (hereinafter referred to as 'the deceased') had taken place prior to nine years of the date of the incident, which took place on January 11, 1994. The deceased had given birth out of the said wedlock to three daughters. Appellant no.1, at the relevant time, was serving as delivery boy of LPG Cylinder. The deceased and appellant No.1 were residing in joint family along with two brothers of appellant N.1 at Government "G" Colony, Block No.27/227, Sukhramnagar. As per the prosecution case, the deceased was treated with cruelty as she had not brought jiyanu (gifts) at the time of birth of child. It was alleged that, because of cruelty meted out to the deceased, she often used to go to her mother's place where she complained against the appellants and the harassment caused by them to her.

4. As per the prosecution case, in the early morning hours of January 11, 1994, i.e. about 5 a.m., when deceased Madhuben was breast-feeding her small daughter in the kitchen, appellant No.1 came with a plastic cane (kerba) which was filled with kerosene and poured kerosene on the deceased. It is alleged that appellant No.1 lit a match-stick and set the deceased on fire. As per the prosecution case, appellant No.2 and the younger brother of the appellants, namely, Jitu (juvenile- who is not before this Court) had snatched away the younger daughter from the lap of the deceased. Appellant No.2 and said Jitu instigated appellant No.1 that she should be set on fire. The deceased, after engulfing fire set on by appellant No.1, ran out of the kitchen to the adjoining varandha where appellant No.1 threw water on her body. Because of extensive burns on her body, the deceased cried and raised shouts. The persons residing in neighbourhood reached the house of appellant No.1. The deceased had sustained severe burn injuries all over her body and the appellants had taken the deceased in an Ambulance Van to Shardaben Hospital where, at 7.45 a.m. the deceased was examined by Dr. Jitendra Virabhai Patel, who was on duty at the Hospital as Chief Medical Officer. Dr. Jitendra Patel had referred the patient to plastic surgery ward. As per the evidence of Dr.

Jitendra Patel, the deceased had sustained severe burns all over body. From Shardaben Hospital, vardhi was sent to Rakhial Police Station that one Madhuben was brought to the hospital by the appellants with burn injuries of 80%. The said vardhi was received by Rakhial Police Station. News about burn injuries sustained by the deceased was sent to the brother of the deceased, namely, P.W.6, Amrutbhai Becharbhai Parmar. Amrutbhai Becharbhai Parmar arrived at Shardaben Hospital at around 10 and 11 a.m. on January 11, 1994. The deceased had informed her brother that she was burnt. The mother of the deceased was residing at village Amrapura and, therefore, Amrutbhai went to village Amrapura to call his mother. The mother of the deceased, namely, Shantaben, P.W.7, arrived at the hospital at around 6 p.m., but, before, that the deceased had expired around 3 p.m.

5. As per the prosecution case, after receiving vardhi from Shardaben Hospital, P.I. K.K. Patel, who was at the relevant time working as IInd P.I. in Rakhial Police Station, arrived at Shardaben Hospital at 10.30 a.m. P.I. K.K. Patel met the Doctor on duty at the hospital and enquired about burn injuries sustained by the deceased. He was informed by the Doctor who was on duty at the hospital that the deceased had sustained burn injuries of 78%. P.I. Patel sent yadi to the Executive Magistrate for recording dying declaration of the deceased. Before sending the yadi, P.I. Patel obtained endorsement of the doctor to the effect that the deceased was conscious and was in a fit state of mind to give dying declaration. After sending yadi to the Executive Magistrate, P.I. Patel went to the burns ward where the deceased was kept as indoor patient. P.I. Patel asserted that the deceased was conscious and was in a fit state of mind and took complaint of the deceased. The complaint was recorded by P.I. Patel between 10.45 a.m. and 11 a.m. Executive Magistrate, Rameshchandra Purshottamdas Patel, received the yadi sent by P.I. Patel to record dying declaration of the deceased at 11.35 a.m. on January 11, 1994. On receiving the said yadi, Executive Magistrate, Rameshchandra Purshottamdas Patel, went to Shardaben Hospital and started recording of dying declaration of the deceased at 12 noon and completed it at 12.16 p.m. Thumb impression of the deceased was also obtained on the dying declaration. After recording of dying declaration, Executive Magistrate Mr. Patel obtained endorsement and signature of the doctor who was in charge of the burns ward that the patient was conscious and well oriented at the time of giving dying declaration. P.I. Patel prepared report under Section 157 of the Code of Criminal Procedure and

along with his report submitted complaint of the deceased before Rakhial Police Station where offence was registered against the appellants and the juvenile offender under Section 307, 498(A) and 34 of the Indian Penal Code at C.R. No.I-10/94. After the death of Madhuben, Section 302 of the Indian Penal Code was added in the said crime register.

6. Investigation was carried out by Ist P.I. Mr. Chandansinh Lakhsinh Rathod. P.I. Rathod summoned officers from the Forensic Science Laboratory and, on arrival of the experts of the FSL, he drew panchanama of place of the incident and seized incriminating articles. P.I. Rathod also summoned Circle Inspector who drew map of scene of offence. P.I. Rathod recorded statements of neighbours, namely, Bai Nanda, Govindsinh Devisinh, Kantaben Babulal, etc. Deceased Madhuben expired at 17 hrs. on January 11, 1994. Therefore, P.I. Rathod went to Shardaben Hospital and held inquest of dead body. After holding the inquest, the dead body of the deceased was sent for post-mortem. On arrival of the mother of the deceased, statements of the mother as well as the brother of the deceased were recorded and, in the same night, at about 23.30 hours, the present appellants and the juvenile offender, Jitu, were arrested. Incriminating articles seized from the place of incident were sent to FSL for analysis and, on receipt of the report from the FSL, and, on completion of investigation, charge-sheet came to be filed against the present appellants in the Court of learned Metropolitan Magistrate, Court No.10, Ahmedabad, which came to be registered as Criminal Case No.387 of 1994 for the offences punishable under Sections 302, 498(A) and 114 of the Indian Penal Code. As offence under Section 302 is exclusively triable by Court of Sessions, learned Metropolitan Magistrate, by order dated March 19, 1994, committed case to the Sessions Court, Ahmedabad City, which came to be numbered as Sessions Case No.90 of 1994. 1991.

7. Charge Exh.2 was framed against the appellants by the learned Sessions Judge for the offences punishable under Sections 302, read with section 34 and 498A of the Indian Penal Code. The charge was read over and explained to the appellants. They pleaded not guilty to the charge and claimed to be tried. To bring home the guilt of the appellants, the prosecution examined (I) PW 1, Dr. Pratik R. Shah Exh.7; (II) PW 2, Executive Magistrate, Shri Rameshchandra Parshottam Patel, Exh.9, (III), PW 3, Police Head Constable, Laxmanbhai Gemabhai Chauhan, Exh.12, (IV) PW 4, Milan Mohanlal Dave Exh.15,

(V) PW 5, Nandaben Manilal Parmar, Exh.25, (VI) PW 6, Amrutbhai Becharbhai Parmar Exh.26, (VII) PW 7, Shantaben Becharbhai Parmar Exh.27, (VIII) PW 8, Second P.I. Keshavlal Kodarlal Patel Exh.32, (IX), PW 9, Dr.Jitendra Virabhai Patel, Exh.39, and (X) P.W.10, First PI, C.L.Rathod, at Exh.40. The prosecution produced documentary evidence consisting of inquest panchanama, post-mortem notes, yadi sent to the Executive Magistrate, dying declaration of the deceased recorded by the Executive Magistrate, copy of vardhi book of Rakhial Police Station, panchanama of scene of offence, map of scene of offence, panchanama of seizure of clothes put on by the deceased, panchanama of seizure of clothes put on by the appellants, vardhi received from Shardaben Hospital, report of FSL, complaint of the deceased Madhuben recorded by PI, Patel, etc. to prove the case against the appellants.

8. After recording of evidence of prosecution witnesses was over, the appellants were generally questioned by the learned Additional Sessions Judge and their statements were recorded under Section 313 of the Code of Criminal Procedure. In their statements, the appellants denied to have committed any offences with which they were charged. However, the appellants had admitted that they had taken deceased Madhuben to Shardaben Hospital for treatment. Appellants Nos. 1 and 2 submitted their written statements at Exh.43 and 44 respectively. In his written statement, appellant No.1 stated that his father Karsanbhai Ambarambhai Parmar was running a provisional store and was residing at Odhav Rabari Colony, and appellant No.2, Raju, was residing at Haripura, Taluka Kadi. Appellant No.1 stated that he was married with deceased Madhuben prior to nine years from the date of incident and it was second marriage of deceased Madhuben. He stated that he had not treated deceased Madhuben with cruelty and not demanded dowry or gift from her brother or mother. Both the appellants, in their further statements, stated that false dying declarations were got prepared with a view to cook up a false case against them.

9. Learned Sessions Judge, on overall appreciation of oral as well as documentary evidence, concluded that (1) deceased Madhuben was treated with cruelty by appellant No.1 as she did not bring enough money and gift after birth of her daughters; (2) deceased Madhuben died homicidal death; (3) dying declaration in form of complaint lodged by deceased Madhuben at Exh.33 and dying declaration recorded by the Executive Magistrate, Exh.10, inspired confidence and were recorded when deceased

Madhuben was conscious and in fit state of mind. (4) dying declarations recorded were corroborated by oral testimony of P.W.6, Amrutbhai Becharbhai Parmar, and P.W.7, Shantaben Becharbhai Parmar, who are brother and mother of deceased Madhuben; (5) evidence of P.W.5, Nandaben Manilal Parmar, who is neighbour of deceased Madhuben, also supported prosecution version that the deceased was conscious even after sustaining burn injuries at her residence. (6) evidence of P.I. Patel and Executive Magistrate R.P. Patel is reliable and trust-worthy and there was no reason for P.I. Patel or Executive Magistrate to falsely record dying declarations implicating the appellants; (7) two dying declarations, one recorded by P.I. Patel and the other recorded by Executive Magistrate, R.P. Patel, proved beyond reasonable doubt that the deceased Madhuben was treated with cruelty and on the night of January 11, 1994, the appellants and the juvenile offender, Jitu, poured kerosene on deceased Madhuben and set her on fire; (8) vardhi lodged from Shardaben Hospital also proved beyond reasonable doubt that deceased Madhuben was killed by the appellants by pouring kerosene on her body; (9) there was meeting of mind between the appellants and as a result of the meeting of mind, they had shared common intention to cause death of Madhuben by pouring kerosene on her body and setting her ablaze. In the ultimate decision, learned Sessions Judge convicted appellant No.1 for the offences under Sections 302 and 498(A) of the Indian Penal Code and sentenced him to undergo R.I. for life under Section 302 of Indian Penal Code and R.I. for two years under Section 498(A) of the Indian Penal Code, and convicted appellant No.2 for the offences under Section 302 read with Section 34 of the Indian Penal Code and sentenced him to undergo R.I. for life giving rise to filing of the present appeal by the appellants.

10. We have been taken through the entire evidence on record by learned Senior Advocate, Mr. K.J. Shethna, assisted by learned advocate Mr. Y.U. Malik, and learned Additional Public Prosecutor, Mr.K.G. Sheth.

11. Learned Senior Advocate, Mr. K.J. Shethana, submitted that first information report recorded by P.I. Patel did not bear endorsement of the Doctor to the effect that, when he recorded complaint of deceased Madhuben, she was conscious and in a fit state of mind. It is contended by learned Senior Advocate for the appellants that, as per the evidence of Dr. Pratik Shah, deceased had suffered second and third degree of burns of about 75% and she was not in a fit state of mind or was

in a position to speak and, therefore, it should be held that it was not possible for her to give detailed version about the incident as mentioned in the FIR Exh.33. It is contended by learned Senior Advocate for the appellants that, as per the evidence of P.W.4, Amrutbhai, who is brother of deceased Madhuben, when he visited her at 10 a.m., she was not able to speak coherently and, therefore, it was not possible for her to lodge complaint before P.I. Patel at 10.45 a.m. It is contended by learned Senior Advocate for the appellants that evidence of P.I. Patel was not reliable and trustworthy as he had not noted down the vardhi in the log-book maintained in the wireless jeep. It is contended by learned Senior Advocate for the appellants that P.I. Patel had in most cavalier fashion, recorded first information report of Madhuben without obtaining endorsement of the Doctor who was on duty in the burns ward. It is contended by learned Senior Advocate for the appellants that, as per the evidence of Dr. Pratik Shah, both palms of the deceased including her thumbs were burnt and it was not possible for the deceased to give thumb mark on the so-called first information report Exh.33. It is contended by learned Senior Advocate for the appellants that, in the dying declaration recorded by the Executive Magistrate, which was produced at Exh.11, endorsement of the Doctor was obtained that, 'patient is conscious and well oriented at the time of dying declaration', but, since the said Doctor was not examined by the prosecution, it creates doubt about reliability and trustworthiness of dying declaration recorded by the Executive Magistrate. It is contended by learned Senior Advocate for the appellants that even before recording of dying declaration, certificate of Doctor ought to have been obtained that the patient was conscious and was in a fit state of mind. It is contended by learned Senior Advocate for the appellants that there was inconsistency between the dying declaration recorded by the Executive Magistrate and the complaint recorded by P.I. Patel. It is contended by learned Senior Advocate for the appellants that oral evidence of P.W.6, Amrutbhai and P.W. 7, Shantaben, (brother and mother of the deceased), did not prove beyond reasonable doubt that the deceased was treated with cruelty by appellant No.1. It is contended by learned Senior Advocate for the appellants that when P.W.6, Amrutbhai, brother of the deceased, visited her at Shardaben Hospital at 10 a.m., she was able to speak in broken words - 'I have burnt : I have burnt'. It is contended by learned Senior Advocate for the appellants that evidence of P.W.6, Amrutbhai, clearly suggests that Madhuben could not have been able to give detailed complaint before P.I. Patel at 10.45 a.m. and

detailed version of the incident in the dying declaration recorded by the Executive Magistrate at 12 noon. It is contended by learned Senior Advocate for the appellants that endorsement of the Doctor below dying declaration that 'patient was conscious and well oriented' raises serious doubt in view of the oral evidence of P.W.6, Amrutbhai Becharbhai Parmar. It is contended by learned Senior Advocate for the appellants that the Executive Magistrate, in his oral testimony, had an audacity to depose that he did not remember whether the deceased was admitted in general ward or special ward or whether other patients were there in the ward. It is therefore contended by learned Senior Advocate for the appellants that the evidence of P.I. Patel and Executive Magistrate R.P.Patel, raises serious doubt as to whether they had in fact recorded so-called dying declarations of deceased Madhuben. Learned Senior Advocate for the appellants in the alternative submitted that evidence against appellant No.2 was very weak as he had not taken any part in causing cruelty on deceased Madhuben and allegation against appellant No.2 in two dying declarations also raises serious doubt about his involvement that he had shared common intention to kill Madhuben. It is, therefore, urged by learned Senior Advocate for the appellants that, in view of the improbable and untrustworthy evidence of the prosecution witnesses, benefit of doubt should be given to the appellants and the appeal be allowed and the conviction and sentence be set aside. Learned Senior Advocate for the appellants further submitted that, with regard to issuance of notice for enhancement of sentence against appellant No.1, even if it is held that appellant No.1 was found guilty as held by the Sessions Court, this was not a rarest of rare case where severe punishment of death sentence was called for. Learned Senior Advocate for the appellants submitted that, looking to the evidence of the prosecution witnesses, when the appellants are entitled to benefit of doubt, notice for enhancement of sentence issued against appellant No.1 be discharged.

12. Learned Additional Public Prosecutor Mr. K.G. Sheth, vehemently submitted that evidence of prosecution witnesses has proved beyond doubt that the deceased was treated with cruelty by appellant No.1. It is submitted by learned counsel for the Government that deceased Madhuben, who was in peak of her youth, would not have dared to commit suicide leaving behind her three minor children. It is submitted by learned counsel for the Government that the incident had taken place in the early morning hours of January 11, 1994 when the deceased was

breast-feeding her minor daughter in the kitchen and appellant No.1 came and poured kerosene on her body and set her ablaze. It is submitted by learned counsel for the Government that involvement of appellant No.2 and juvenile offender, Jitu, has also been proved beyond doubt that they had taken active part in instigating appellant No.1 to pour kerosene on the deceased and set her on fire. Learned Additional Public Prosecutor further submitted that two dying declarations in the nature of first information report Exh.33 and the dying declaration Exh.11 recorded by the Executive Magistrate, proved beyond reasonable doubt that the appellants had shared common intention to cause murder of deceased Madhuben by pouring kerosene on her and setting her ablaze. It is submitted by learned counsel for the Government that endorsement made by the Doctor on the yadi sent to the Executive Magistrate and endorsement on the dying declaration to the effect that the patient was fully conscious and well oriented, read with oral evidence of Executive Magistrate, Mr. R.P. Patel, clearly indicates that the deceased was fully conscious and was in a fit state of mind to make statement when the dying declaration was recorded. It is submitted by learned counsel for the Government that first information report lodged by the deceased had become dying declaration after her death and the dying declaration recorded by the Executive Magistrate makes it abundantly clear that the appellants had subjected deceased Madhuben to cruelty and, therefore, conviction of appellant No.1 under Section 498(A) of the Indian Penal Code should be upheld. It is submitted by learned counsel for the Government that two dying declarations recorded by P.I. Patel and Executive Magistrate, R.P. Patel, proved beyond reasonable doubt that both the appellants had shared common intention to commit murder of the deceased and, therefore, they had poured kerosene on her and set her ablaze. Learned counsel for the Government, while addressing the Court on the question of enhancement of sentence, submitted that appellants had acted mercilessly in committing murder of the deceased while she was breast-feeding her minor daughter and then snatched the child and acted in most brutal manner by drenching the deceased with kerosene, and aided each other to commit ghastly murder of the deceased. It is therefore submitted by learned counsel for the Government that appellant No.1 had acted in a most cruel manner and, therefore, this was a fit case to impose the maximum punishment of death sentence on appellant No.1.

13. From the evidence of Dr. Pratik Shah and post-mortem note, the prosecution has established that

deceased Madhuben died of severe burn injuries which were of 75% to 80%. As per the post-mortem note Exh.8, cause of death of the deceased was due to shock of burn injuries. In view of the oral evidence of Dr Pratik Shah and post-mortem notes Exh.8, we are of the opinion that the deceased had met with her death due to shock received on account of burn injuries. The prosecution has heavily relied on two dying declarations, viz. (i) first information report Exh.33 recorded by P.I. Mr. K.K. Patel, P.W.8, Exh.32 which came to be treated as dying declaration after death of Madhuben and (ii) dying declaration Exh.11 recorded by Executive Magistrate, R.P. Patel in order to bring home the charge against the appellants under Sections 302 read with section 34 of the Indian Penal Code.

14. In the case of Jai Karan vs. State of Delhi (NCT), (1999) 8 Supreme Court Cases 161, the Supreme Court held as under:

"A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premiss that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence neither extra strong nor weak - and can be acted upon without corroboration if it is found to be otherwise true and reliable. [Padmaben Shamalbhai Patel vs. State of Gujarat (1991) 1 SCC 744 : 1991 SCC (Cri) 275]"

Further, in the case of Paniben vs. State of Gujarat, (1992) 2 SCC 474, the Supreme Court summed up the

principles of dying declaration with the following observations:

"Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature so as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgements the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration (Munnu Raja vs. State of M.P: (1976) 3 SCC 104).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration (State of U.P. vs. Ram Sagar Yadav: (1985) 1 SCC 552: Ramavati Devi vs. State of Bihar: (1983) 1 SCC 211)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramachandra Reddy vs. Public Prosecutor: (1976) 3 SCC 618)

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. (Rasheed Beg vs. State of M.P : (1974) 4 SCC 264).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected (Kake Singh vs. State of M.P. : 1981 Suppl SCC 25)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (Ram Manorath v. State of U.P. (1981) 2 SCC 654)

(vii) Merely because a dying declaration does not

contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurti Laxmipati Naidu : 1980 Supp SCC 455)

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Ojha v. State of Bihar: 1980 Suppl SCC 769)

(ix) Normally the courts in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P.: 1988 Supp SCC 152)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon (State of U.P. vs. Madan Mohan : (1989) 3 SCC 390)"

15. Testing dying declaration produced on the record of the case on the touchstone of the principles laid down in the decisions noted above, the position that emerges is that the prosecution evidence rests solely on the dying declaration said to have been made by the deceased before PW 8, PI, Mr. K.K. Patel and another dying declaration recorded by PW 2, Executive Magistrate, R.P. Patel. Evidence of P.W. 8, P.I. K.K. Patel, shows that on January 11, 1994, he was serving as Second P.I. in Rakhial Police Station and was on patrolling duty around 10 a.m. He received a vardhi in his wireless jeep from Senior P.I. C.L.Rathod at 10.30 a.m. to the effect that one lady was in serious condition due to burn injuries in Shardaben Hospital. On receiving vardhi, he rushed to Shardaben Hospital and enquired about the patient. He learnt from the Doctor who was on duty at the hospital that deceased Madhuben had sustained burn injuries of 78%, but was conscious and in a fit state of mind. P.I. Patel therefore sent yadi to the Executive Magistrate summoning him to record dying declaration of deceased Madhuben. In the meantime, P.I. Patel also went to the ward where deceased Madhuben was admitted and, therefore, after being satisfied that the deceased was conscious and in fit state of mind, recorded complaint as told by deceased Madhuben. P.I. Patel had obtained thumb impression of deceased Madhuben after recording her first information report. The said first information report after death of deceased Madhuben had become dying declaration which is produced at Exh.33 on the record of this case.

Free translation of first information report

Exh.33 is as under:-

I, Madhuben, wife of Natwarbhai Alias Babubhai Parmar, aged about 25 years, occupation: Household, resident of Government "G" Colony, Block No.27/227, Sukhramnagar, Ahmedabad, being questioned, state that I reside at the above address along with my husband, father-in-law, two brothers-in-law, and three minor daughters. I am doing household work. My marriage had taken place before eight years and out of the said wedlock, I had given birth to three daughters. My husband is delivery boy of LPG cylinders.

Today at 5 a.m., I was sitting in my kitchen and was breast-feeding my minor daughter, Deepa. At that time, my husband brought one plastic cane (kerba) filled with kerosene. He started pouring kerosene on me and uttered words 'I do not care even if you die'. My younger brother-in-law, Jitu, had snatched away my minor daughter, Deepa, from my lap. At that time, my brother in law, Raju, was also present and both of them (Jitu as well as Raju) had spoken words 'set her on fire'. My husband, thereafter, lit a match-stick and threw it on my body and I started burning and raised shouts and I tried to run out of the kitchen. When I came out of the kitchen, my husband threw water on my body. In the meantime, all the neighbours residing near my house had assembled. My whole body was burnt. The reason for setting me on fire is that when I was pregnant, no ornaments were given by my parents. My husband was pressurizing me that I should bring ornaments from my parents' house and, as I was not able to bring ornaments, he used to beat me. Prior to two days of the date of the incident, my husband had beaten me and, today, in the morning, he poured kerosene and set me on fire. At the time of the incident, my father-in-law was at his shop which is situated at Odhav. My parents' house is situated at village Amarpara, Taluka Vijapur, District Mehsana. I have two brothers who reside with my mother at village Amarpara and my father had expired. Today, at 5 a.m., when I was sitting in my kitchen and breast-feeding my daughter Deepa, my husband poured kerosene on my body and my younger brother-in-law, Jitu, snatched away my daughter, Deepa, from my lap. My both brothers-in-law, Jitu and Raju, told my husband to set me on fire. Thereafter, my husband lit a match stick and threw it on my body and set me on fire. I, therefore, file this complaint against my husband and two brothers-in-law. My witnesses are my neighbours.

What is stated hereinabove is my own version which is true and correct.

Left hand thumb
impression of -----
of Bai Madhuben Before me
as her right Sr. P.I.
thumb was burnt Rakhial
Police Station

I have received copy
of the complaint

Left hand thumb
impression of -----
of Bai Madhuben Before me
Sr. P.I.
Rakhial
Police Station

It may be mentioned that, in the first information report, Exh.33, no time is mentioned and no endorsement of the Doctor was obtained by PI, Mr. Patel. Learned Senior Advocate for the appellants has vehemently attacked the genuineness of the first information report lodged by deceased Madhuben on the ground that PI, Patel, had not obtained endorsement of the Doctor before recording the first information report and even the time was not mentioned when the first information report of the deceased Madhuben was recorded. Oral evidence of PI Patel indicates that he had received vardhi from Rakhial Police Station while he was on patrolling duty in his wireless jeep. Surprisingly enough, no entry was made in the log-book of the jeep in which PI, Patel, was on patrolling duty. PI, Patel, in his evidence, deposed that he had received vardhi at 10.30 a.m. and, thereafter, he had gone to Shardaben Hospital. He further deposed that first information report was written down by writer constable, but, PI, Patel, has not given the name of writer constable, who had written the complaint of deceased Madhuben. He also deposed that the complaint was recorded between 10.45 a.m. and 11 a.m. and, at that time, Madhuben was conscious and was able to speak. PI, Patel, was searchingly cross examined and he admitted in cross examination that it was correct that he had not entered vardhi received from Rakhial Police Station in the log-book which was kept in the jeep. He further deposed that, when he reached the Hospital around 10.45 a.m., he met police constable Rameshkumar. He deposed that he enquired from police constable

Rameshkumar as to who had given vardhi. He admitted that he did not inform the Doctor who was on duty at the burns ward that he had come to record first information report of Madhuben. Cross examination of PI, Patel, reveals that he had not made any enquiry about physical condition of deceased Madhuben before recording of dying declaration. He admitted that Madhuben was in serious condition and her whole body was burnt and her relatives were surrounding her. He denied the suggestion that, when he was recording first information report of Madhuben, she was yelling in pain and her speech was coherent. He admitted that, at the time of recording of first information report, he had not kept with him the Doctor who was present in the ward. He showed his ignorance that both the hands and palms of deceased Madhuben were burnt and, therefore, it would not have been possible to take thumb impression of Madhuben. In this connection, if we peruse oral testimony of PW 9, Dr. Jitendra V. Patel, Exh.39, it becomes evident that Madhuben was brought to Shardaben Hospital at 7.45 a.m. by her husband. Dr. Jitendra Patel had first examined deceased Madhuben before admitting her in the hospital. He deposed that, when he examined deceased Madhuben, she was conscious, but she was disoriented. Dr. Jitendra Patel was specifically questioned: What is the meaning of 'disorientation'? He explained that 'disorientation' means that the patient was not in fit state of mind. He also deposed that deceased Madhuben sustained burn injuries of 80% and the burns were of third degree. This was the condition of deceased Madhuben at 7.45 a.m. when she was admitted in Shardaben Hospital. Surprisingly enough, the prosecution did not produce case papers of deceased Madhuben when she was admitted in Shardaben Hospital. The Court was kept in dark about physical condition of deceased Madhuben and what treatment was given to deceased Madhuben at the hospital. It was the duty of the prosecution to produce medical case papers of Madhuben. In view of the oral deposition of PW 9, Dr. Jitendra Patel, it appears that, when Dr. Jitendra Patel deposed that the patient was 'disoriented', deliberately case papers were not produced by the prosecution.

16. In light of oral evidence of Dr. Jitendra Virabhai Patel, non-obtaining of endorsement of the Doctor, who was present in the burns ward of Shardaben Hospital, in the first information report, assumes more importance. If deceased Madhuben was in 'disoriented condition' at 7.45 a.m., then what would have been her condition at 10.45 a.m. when the first information report was recorded by PI, Patel? The Court is kept in dark of the treatment which deceased Madhuben received at

the hospital and whether after receiving treatment, her condition had improved. PW 6, Amrutbhai, who is brother of deceased Madhuben, deposed that, when he arrived at Shardaben Hospital around 10 a.m., he had gone to the bed of his sister, Madhuben, and, at that time, he had enquired from her how she sustained burn injuries. As per the evidence of this witness, Madhuben was not able to reply coherently and she was speaking with difficulty and she only replied that, 'she is burnt she is burnt'. Oral evidence of PW 6, Amrutbhai, also discloses that at 10 a.m. Madhuben was not able to speak fluently and she could speak with great difficulty. The evidence of PW 6, Amrutbhai and PW 9 Dr. Jitendra V. Patel, as discussed above, creates doubt in our mind whether Madhuben was conscious enough and in fit state of mind to give vivid and detailed version of the incident as mentioned in the first information report. The first information report, therefore, cannot be regarded as reliable piece of evidence so as to implicate the appellants with the commission of crime, for which, they have been charged. First information report Exh.33, in our opinion, is not a document free from any doubts. PI, Patel, in most casual and cavalier fashion, without obtaining endorsement of the Doctor, who was on duty at the burns ward, had started recording first information report. He even did not inform the Doctor that he had come to record first information report of deceased Madhuben. Therefore, we are of the opinion that the first information report was not given by Madhuben in a fit state of mind and her condition was disoriented so as to give the correct version as mentioned in the first information report.

17 The other piece of evidence on which the prosecution relied is dying declaration recorded by Executive Magistrate, Rameshchandra Parshottam Patel. PW 2, Rameshchandra P. Patel, deposed that he received yadi at 11.35 a.m. on January 11, 1994 when he was working in his office requesting him to record dying declaration of deceased Madhuben. The said yadi was signed by Senior Police Inspector of Rakhial Police Station. He deposed that he reached Shardaben Hospital around 12 noon and went straight to burns ward. On enquiry, he was shown the bed on which Madhuben was sleeping. He deposed that Madhuben was conscious and he did not remember whether any relative was sitting besides her. He deposed that he started recording dying declaration at 12 noon and completed it at 12.16 p.m. As per his evidence, after completing recording of dying declaration of Madhuben, he obtained endorsement of the Doctor, who was present in the ward. He also deposed that he had obtained left-hand thumb impression of Madhuben on completion of recording

of dying declaration. The dying declaration recorded by Executive Magistrate, was produced at Exh.11 of the record of the case. Dying declaration Exh.11 is in question and answer form and free translation of it is as under:

"Recording of dying declaration started at 12 noon on 11.1.1994

Dying Declaration

1. What is your name ?

Madhuben

2. What is your husband's name?

Babubhai Karsanbhai

3. What is your caste?

Parmar

4. What is your age?

25 years

5. What is your occupation ?

House wife

6. Where do you reside ?

'G' Colony, Baliakaka,

House No.227, Sukhramnagar, Ahmedabad

7. How many persons reside with you ?

My husband, my father-in-law, my two brothers-in-law, my three daughters and myself reside jointly in the house.

8. When and at what time the incident had taken place ?

On January 11, 1994 at 5 a.m.

9. At which place the incident had taken place?

Incident had taken place at the house of my husband.

10. What were the clothes put on by you at the time of the incident?

I had put on a polyester sari, polyester blouse and a polyester petticoat

11. What was your marriage life ?

I had married before 8-9 years prior to the incident.

12. State in brief how the incident happened ?

I was sitting in kitchen and breast-feeding my daughter. My husband came from behind and poured kerosene on me and set me on fire by lighting a match-stick. My brothers-in-law were also present. They had snatched my daughter. After I was set ablaze, I ran outside kitchen, and my husband threw water and brought me to the hospital.

On being questioned as to who were present in the house, I state that my husband, my brothers-in-law, Raju and Jitu, were present. My daughters were also present.

My whole body is burnt.

13. Have you set yourself ablaze?

No. I was set ablaze by my husband and my two brothers-in-law.

14. What is the cause for setting you on fire ?

Since last two days, there was quarrel between me and my in-laws.

On being questioned about what was the cause of quarrel, I state that, at the time when I was pregnant no ornaments or gift were given by my parents and, therefore, my husband was beating and asking me to bring money and ornaments from my parents' house. I was not able to bring money or ornaments, because my mother is a widow and her financial condition was not sound.

15. Have you committed suicide ?

No. I was set on fire.

16. Have you got strained relation with anybody in your house?

With my husband, who was quarrelling with me and beating me daily.

17. Are you treated with cruelty by anybody in your house ?

I was treated with cruelty by my husband.

18. Do you want to say anything further ?

No

What is stated hereinabove has been read over to me and it is true and correct and out of my own volition. Hence, I am signing below. I am illiterate.

Place: Shardaben Hospital

Burns ward -----

completed at 12.16 p.m Left-hand thumb
impression of
Madhuben

Before me

sd/-

Executive

Magistrate

Metropolitan

Area

Ahmedabad.

Patient is conscious and
well oriented at the time
of dying declaration

sd/-

(Dr. C.N. Antani)

11.1.1994

At the time of recording of

dying declaration, no police officer was present. I had verified that the patient was conscious at the time of recording of dying declaration and no relatives of the patient were present

sd/-

(R.P. Patel)

Executive Magistrate

Metropolitan Area

Ahmedabad

P.W.2, Executive Magistrate, R.P. Patel, Exh.9, deposed that he started recording of dying declaration at 12 noon and completed it at 12.16 p.m. and, after completing dying declaration, he obtained endorsement of the Doctor who was present at the burns ward of Shardaben Hospital. Cross examination of Executive Magistrate reveals that he was not aware whether patient, Madhuben, was admitted in special room or general ward. He deposed that he did not remember any relatives were present near the bed of deceased Madhuben or not. He also deposed that he did not remember whether he had asked the relatives to go away from the bed of Madhuben as he wanted to record dying declaration of her. He deposed that he did not remember whether, at the time of recording of dying declaration, deceased Madhuben was yelling due to pain. He deposed that, before recording dying declaration, he had not consulted any Doctor who was present in the ward. He deposed that he was not in a position to state whether deceased Madhuben was not able to speak fluently and was answering incoherently. He deposed that he had given copy of dying declaration to Second PI, Mr. K.K. Patel. It is the prosecution case that, before recording of dying declaration by the Executive Magistrate, PI, Patel, had also recorded first information report of deceased Madhuben. PI, Patel, had taken left hand thumb impression on the first information report twice, yet, the Executive Magistrate deposed that he was not aware whether there was any marks of ink on the left hand thumb of deceased Madhuben when he took her thumb impression on dying declaration. This inconsistency in the evidence of the Executive Magistrate also creates doubts in our mind about genuineness of the dying declaration. In dying declaration Exh.11, the Executive Magistrate had obtained endorsement of Dr. C.M. Antani that the patient was conscious and well oriented at the time of recording of dying declaration. The Executive Magistrate, Mr. R.P. Patel, in his oral deposition, did not refer the name of

Dr. C.N. Antani. As stated earlier, evidence of Dr. Jitendra Patel, PW 9, destroys the prosecution case that deceased Madhuben was conscious and well oriented at the time of recording of dying declaration by the Executive Magistrate. PW 9, Dr. Jitendra Patel, had, in clear terms, stated that, when he examined the patient first at the time of admitting her in the hospital, even though she was conscious, yet she was not well oriented. In absence of any medical papers produced on the record of the case and non-examination of Dr. Antani, it is difficult to believe the endorsement made by the Doctor at the end of the dying declaration that the patient was conscious and well oriented at the time of recording of dying declaration. The word 'disorientation' is defined in Dorland's Medical Dictionary, Edition 25, as under:

"disorientation The loss of proper bearings, or a state of mental confusion as to time, place, or identity. spatial d., the inability of a pilot or other air crew member to determine spatial attitude in relation to the surface of the earth; it occurs in conditions of restricted vision, and results from vestibular illusions."

It is true that in a case of dying declaration, conviction can be based solely relying on it without any corroboration, but, the Court should be satisfied that the dying declaration recorded is genuine and does not suffer from any infirmity or doubt. The way in which dying declaration came to be recorded by the Executive Magistrate in a most casual manner raises serious doubts in our mind about its genuineness. Evidence of Dr. Pratik Patel, PW 1, Exh.7, who performed post-mortem of dead body of deceased Madhuben, indicates that both the hands and palms including thumbs of deceased Madhuben were totally burnt. In view of the oral evidence of Dr. Pratik Patel, it could not have been possible for PI, Patel, or the Executive Magistrate, to have obtained thumb impression of deceased Madhuben in the first information report as well as in the dying declaration. Deceased Madhuben had sustained burn injuries to the extent of 75% of second and third degree. These injuries were sustained by the deceased at 5 a.m. on January 11, 1994 and at 7.45 a.m. she was found to be disoriented. The prosecution has led no evidence to show as to what type of treatment was given to the deceased in the hospital and whether her condition had improved after the treatment. In absence of medical case papers indicating the treatment given to the deceased, it is difficult to believe that the condition of the deceased had improved after 7.45 a.m. and she had regained orientation. No evidence is produced by the prosecution to show that, at the time of recording of first information report and

dying declaration, the deceased was conscious and well oriented. The Doctor, who had made endorsement below the dying declaration, was also not examined by the prosecution, nor medical case papers of the deceased were produced to corroborate the endorsement made by the Doctor in the dying declaration. In view of the infirmities as indicated above, we are of the opinion that the dying declaration recorded by Executive Magistrate, R.P. Patel, is not genuine piece of evidence and raises serious doubts. In the instant case, as the prosecution case solely rests on dying declaration, it was necessary for the prosecution to prove that dying declaration was genuine and was recorded when the patient was in a fit state of mind. The certificate, which was appended to at the end of the dying declaration by Dr. Antani, did not comply with the requirement inasmuch as in support of it, neither Doctor was examined nor the medical case papers for the purpose of showing the physical condition of the patient, Madhuben, were produced.

18 In the dying declaration, the deceased had alleged that she was meted out with cruelty by her husband. The statement of the deceased does not get corroboration from the oral evidence either of her brother, PW 2, Amrutbhai, or of her mother, PW 3, Shantaben. PW 3, Shantaben, who is the mother of the deceased, has not supported the prosecution case that there was demand of ornaments and dowry from the deceased by her husband, namely, appellant No.1. The evidence of PW 5, Nandaben Manilal Parmar, Exh.25, who happens to be neighbour of appellant No.1, shows that she was residing in the adjoining house of appellant No.1 and she had never learnt or seen appellant No.1 ill-treating deceased Madhuben or causing cruelty to her. The conduct of appellant No.1 in throwing water on Madhuben after she sustained burn injuries also indicates that he had not set the deceased on fire by pouring kerosene. Both the appellants had remained present during the period when Madhuben was admitted in Shardaben hospital. Smell of kerosene was coming from the head and hair of the deceased also indicates that it was possible that Madhuben might have poured kerosene on her head. Both the dying declarations in form of first information report and other recorded by the Executive Magistrate, are not free from doubts. The prosecution has not led sufficient evidence to prove that the deceased was in a fit state of mind and well oriented when first information report Exh.33 and dying declaration Exh.11 were recorded. The real dying declaration alleged to have been made by deceased Madhuben before her brother,

PW 2, Amrutbhai, does not implicate the appellants nor it refers to any cruelty meted out by appellant No.1 to deceased Madhuben. As stated above, both dying declarations suffer from serious infirmities and, therefore, we are of the opinion that, in convicting the present appellants, the learned Additional Sessions Judge has erred in placing reliance on the dying declarations without there being other corroborative evidence. The way in which the first information report was recorded by PI, Patel, also raises serious doubts in our mind as to whether deceased Madhuben was in a fit state of mind so as to give vivid and full description in the manner in which the incident had taken place. Oral testimony of the Executive Magistrate also suffers from serious infirmities as he has not given proper account of recording of dying declaration of deceased Madhuben in the hospital by him. Non-production of material evidence, i.e. medical case papers for the treatment given by the Doctor at the Shardaben Hospital to deceased Madhuben also raises serious doubts in our mind and an adverse inference deserves to be drawn against the prosecution.

19. In the facts and circumstances of the case emerging from the evidence on record as discussed in the foregoing paragraphs, we find it difficult to rely upon alleged dying declarations as sole basis for conviction. On a perusal of the record and on giving anxious consideration to the entire matter, we are of the view that it will not be safe to convict the appellants solely on the basis of dying declarations made by the deceased. Learned Additional Sessions Judge, Court No.6, City Civil & Sessions Court, Ahmedabad, has erred in convicting the appellants under Sections 302 read with 34 and 498(A) of the Indian Penal Code. Hence, this appeal deserves to be allowed and conviction of the appellants and sentence imposed on them deserves to be quashed and set aside.

20. As a result of the foregoing reasons, the appeal is allowed. Conviction and sentence imposed on the appellants by the learned Additional Sessions Judge, Court No.6, City Civil & Sessions Court, Ahmedabad, for the offences under Sections 302 read with 34 and 498(A) of the Indian Penal Code, is quashed and set aside. The appellants are acquitted for the offences under Section 302 read with 34 and 498(A) of the Indian Penal Code. The appellants are in custody and they are ordered to be set at liberty forthwith if their presence is not

required in connection with any other criminal case.
Muddamal be destroyed as per the direction given in the
impugned judgment and order.

21. Suo-motu notice issued against appellant No.1 in
Misc. Criminal Application No.5081 of 1985 for
enhancement of sentence is discharged.

(swamy)